IN THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

SHELIA D. ALLEN,
now known as
SHELIA D. ELIAS
Plaintiff,

vs. CIVIL ACTION No. 97-D-24

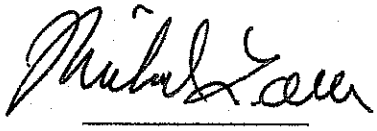
MICHAEL L. ALLEN,
Defendant.

West Virginia Supreme Court of Appeals

Certificate of Service

The undersigned, pro se petitioner, hereby certifies that on the 16th day of June, 2008, he served the PETITION TO APPEAL CIRCUIT COURT ORDER ENTERED MARCH 13, 2008, DOCKETING STATEMENT AND DESIGNATION OF THE RECORD on the plaintiff at her last known address of record

Shelia D. Elias
Rt. 2 Box 71
Letart, WV 25253



Michael L. Allen
Pro se petitioner
122 Dodd Drive
Spencer, WV 25276
304 927-5606

TABLE OF AUTHORITIES

A. Statutes

B. Cases

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

NATURE OF PROCEEDINGS AND RULING IN TRIBUNAL BELOW

Michael L. Allen, the pro se, petitioner below, appeals the decision of the Circuit Court of Roane County, West Virginia, the Honorable David W. Nibert, presiding, which on appeal from Family Court, (Special Family Court Judge Deloris J. Nibert presiding), affirmed in part and reversed in part the Family Court's order that modified an existing child support order and denied sanctions against the respondent's counsel. The Circuit Court's order was in response to the petitioner's appeal of Family Court order and was entered on March 13, 2008.

STATEMENT OF FACTS

By final order entered on August 25, 1998, after a final hearing on December 5, 1997, the parties were divorced. The respondent, Shelia D. Allen, now known as Shelia D. Elias, was awarded legal custody of the children, and physical custody was shared pursuant to the terms of a parenting agreement that was attached and incorporated by reference as part of the final order. Since the entry of the final order, the legal custody of the minor children was changed from the respondent to the petitioner by adoption of the Family Law Masters' Decision and Recommended Order by the Circuit Court, Judge Charles E. McCarty presiding. The Family Law Master's Recommended Order was entered August 11, 2000[1] and after the Circuit Court heard the respondent's objections and petition for review, was adopted and entered by the Circuit Court on

[1] Shortly thereafter, by virtue of a temporary order, the minor children's custodial parent was changed to the petitioner herein.

December 20, 2000.

Judge Charles E. McCarty left office on December 31, 2000, and new judges took office on January 1, 2001.[2] Soon thereafter, the mother filed a pleading titled "Rule 60(b) motion for clarification and/or reconsideration," served on January 18, 2001. The mother did not cite any new grounds for reconsideration; she just asked the court "to clarify and/or reconsider the Final Judgment entered" in the case and stated that the prior Circuit Court Judge had failed to adequately address the legal issues she had raised in her petition for review. On December 28, 2001[3] the Circuit Court granted the Rule 60(b) relief and ordered the children returned to the respondent. The petitioner appealed the Circuit Court's order to this Honorable Court with the appeal granted and upon decision of the appeal; the Circuit Court's Rule 60(b) ruling was affirmed by order entered September 18, 2002. Shortly thereafter, upon Family Court order, the minor children's legal custody was returned to the respondent and a hearing to modify child support, based on a change of legal custodial parent, was scheduled for October 23, 2002.

On November 6, 2002, the Family Court entered an order setting child support and denied the respondent's motion for attorney fees. On December 9, 2002, the respondent simultaneously filed a Rule 60(b) motion for relief from the November 6,

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[2]One of the new judges, the Honorable Thomas C. Evans, III, had been counsel to the father in this case, so the other new judge, the Honorable David W. Nibert, was automatically assigned the case.

[3] On January 1, 2002 the Family Court system was activated and in accordance with the new law the pending Rule 60(b) matter would have been automatically reassigned to the newly created Family Court Judge who was the former Family Law Master who issued his recommended order on August 11, 2000.

2002 child support modification & legal fees order with the Family Court and a Petition for Appeal from the same order with the Circuit Court. The Circuit Court refused the appeal petition by order entered January 8, 2003. The Family Court entered an order **October 6, 2004** instructing the Circuit Clerk to remove the respondent's Rule 60(b) petition from the docket (in effect dismissing). Without further pleadings, filings or hearings the Family Court entered orders on **January 31, 2005** and **February 1, 2005** granting the respondent's Rule 60(b) petition seeking relief for the November 6, 2002 child support & legal fees order.

The petitioner timely appealed to the Circuit Court the Family Court orders granting Rule 60(b) relief. The Circuit Court, by order entered November 18, 2005, granted the petitioner's appeal and overruled the Family Court's Rule 60(b) order entered on January 31, 2005, but did not specifically rule on the Family Court order entered February 1, 2005.

On February 7, 2006, the respondent filed an additional financial disclosure, which contained confidential copies of the petitioner's and his spouse's jointly filed state income tax returns, obtained via a Subpoena Duces Teum served June 25, 2005 on the State of West Virginia Department of Tax and Revenue. In response, the petitioner filed, on February 13, 2006, an objection to the filing of the additional financial disclosure on the basis that the confidential information was obtained in violation of Rule 55 of the West Virginia Supreme Court's Rules of Practice and Procedure for Family Court and West Virginia State Code 11-10-5.

On **February 9, 2006**, the respondent designated the record and appealed[4] to this Honorable Court the Circuit Court's order entered November 18, 2005 that overruled the Family Court's Rule 60(b) order. The petition for appeal was the Rule 60(b) order that would change the Family Court's Modification of Child Support & Legal Fees Order entered November 6, 2002. This Honorable Court received the appeal petition and designated record on March 7, 2006. On **February 28, 2006**, while the Rule 60(b) appeal was pending before the Supreme Court and the Supreme Court was the Court of Jurisdiction, the respondent filed, with the Family Court, a Petition for Modification of Child Support Order. The petition was to modify the existing child support & legal fees order entered November 6, 2002. Therefore, both the Supreme Court and the Family Court were being simultaneously petitioned to modify the existing child support order entered November 6, 2002.

On March 15, 2006, the petitioner, without the knowledge of a petition for appeal pending before the Supreme Court, filed a Motion for Sanctions against the respondent's counsel for violations of Rule 55 of the West Virginia Supreme Court's Rules of Practice and Procedure for Family Court and West Virginia Code 11-10-5.

By order entered July 7, 2006, the Supreme Court denied the respondent's Rule

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[4] The petitioner, never received a copy of this petition for appeal and does not have a copy, nor has he ever seen a copy. The petitioner only became aware of the petition for appeal after the Clerk for the Supreme Court notified him that the appeal petition was denied. The petitioner did make the respondent's counsel aware of the omission on two different occasions, but the lawyer refused to provide the father a copy of the petition.

60(b) appeal that would have changed the existing child support & legal fees order entered November 6, 2002.

On October 31, 2006, acting on the respondent's Petition for Modification of Child Support filed on **February 28, 2006** (while the Supreme Court was the Court of jurisdiction), the Family Court conducted a hearing to modify the child support order entered November 6, 2002. At the same hearing, without being noticed to either party, the Family Court conducted a hearing on the petitioner's Motion for Sanctions against Attorney H. Beth Sears. At the hearing, the petitioner objected to the Family Court hearing the Motion for Sanctions as the matter was not noticed, therefore, nor was he prepared to represent the merits of his petition. The petitioner as well objected to the Family Court hearing the matter of child support modification as the Family Court lacked subject matter jurisdiction and objected to the Family Court not averaging his self-employment income in accordance with West Virginia Code 48-1-228. Regarding jurisdiction, the petitioner presented the Family Court a copy of the Supreme Court's decision in *Ray v. Ray # 31674*, noting that when a court determines it does not have subject matter jurisdiction, it can take no further action than to dismiss the matter. The Family Court made a finding that the matter before it was distinguishable from *Ray v. Ray* and continued to modify the child support order entered November 6, 2002. The Family Court's order modifying child support and denying sanctions was entered March 9, 2007.

On April 7, 2007, the petitioner petitioned the Circuit Court to appeal the Family

Court's order entered March 9, 2007 that modified child support and denied sanctions. The petition assigned five errors for appeal: *Ground One* – the Family Court erred by finding it did have subject matter jurisdiction. *Ground Two* – the Family Court erred when it failed to average the petitioner's self-employment income in accordance with WV Code 48-1-228. *Ground Three* – the Family Court erred by incorrectly calculating the number of overnights the children are scheduled to be with each parent for the purposes of calculating support. *Ground Four* – the Family Court erred when it did not allocate unreimbursed medical expenses in accordance with WV Code 48-12-102. *Ground Five* - the Family Court erred by finding Rule 55 of the West Virginia Supreme Court's Rules of Practice and Procedure for Family Court was rescinded (at the time of the hearing) and no longer enforceable.

By order entered March 13, 2008, the Circuit Court affirmed in part and reversed in part the Family Court's order that modified child support and denied sanctions against the respondent's counsel. It is this order from which the petitioner appeals this day.

The Circuit Court essentially found that the Family Court did not have subject matter jurisdiction to modify child support while the matter was before the West Virginia Supreme Court of Appeals, but once the Supreme Court denied the petition for appeal then the Family Court would automatically be restored jurisdiction. The Circuit Court made its finding of automatic restoration of jurisdiction without citing any laws, authorities or court opinions.

The Circuit Court ordered a modification of child support retroactively effective August 1, 2006 and overturned the Family Court's retroactive effective calculation to April 1, 2006, by finding the Family Court lacked jurisdiction until July 7, 2006 (the day the denial of appeal petition was entered by the Supreme Court). The Circuit Court cited the jurisdiction precedent case of Hinkle v. Bauer Lumber & Home Building Center, Inc., 158 W. Va. 492, 211 S.E.2d 705 (1975), and then proceeded to find the following:

> *Hinkle* and a multitude of other West Virginia cases clearly hold that when a court has no jurisdiction to entertain the subject matter of a civil action, the court must take no action in the case other than to dismiss it from the docket. *Id.* The circumstances of these Family Court cases are distinguishable from the line of cases which give rise to the legal principle set out in Hinkle. *Id.* In those cases, the court lacked jurisdiction and would never have jurisdiction to hear the subject matter presented to the court. Unlike those cases, the jurisdictional impediment to the Family Court hearing a newly filed Petition for Modification exists only while a previous order is appealable or an appeal is pending.

The Circuit Court failed to recognize in the precedent opinion and all the following line of opinions involving jurisdictional matters, that the Supreme Court ruled that the court without jurisdiction can only take action to dismiss the matter. The Circuit Court created a distinction and exception from these opinions with respect to matters before Family Courts. However, no such distinction exists in law or precedent, however, the West Virginia Supreme Court of Appeals addressed Family Court jurisdiction and specifically modification of a prior order of child support in *Ray v. Ray No. 31674.* In the *Ray* opinion, the Supreme Court clearly found that even when the Family Court heard a Petition for Modification of Child Support, even significantly after the appeal period had expired, the **Family Court lacked jurisdiction the date the petition for modification was filed and at that time the Family Court was without jurisdiction and therefore**

the only action it can take is to dismiss the matter. The Supreme Court in *Ray* made no finding or automatic jurisdiction restoration and found just the opposite.

In the instant matter, the Circuit Court found: "*Clearly the Family Court was without jurisdiction to entertain Petitioner's Petition for Modification when the petition was served on Respondent on March 6, 2006.*" However, instead of finding that the Family Court was only allowed to dismiss the case, in accordance with a long line of Supreme Court rulings, the Circuit Court found: "*The refusal of the Petition of Appeal by the Supreme Court of Appeals restored to the Family Court subject matter jurisdiction*".

In response to the petitioner's *Ground 2* appeal from Family Court order to the Circuit Court, the Circuit Court found the father (petitioner) did not object to the method used by the Family Court and invited the error made by the Family Court in calculating child support and therefore, would not entertain the issue on appeal. The Circuit Court's finding is erroneous as the record reflects the petitioner did object to the Family Court's failure to follow the applicable law and specifically informed the Family Court of the requirement to average the self-employment monthly income over the previous thirty-six month period or during a period beginning with the month in which the parent first received such income, whichever period is shorter, in accordance with West Virginia Code 48-1-228. The Family Court ordered: "*The Father, who is self-employed, does not have three (3) years of self–employment income to average. Therefore, the court finds that it is appropriate to use his 2006 income and to give him credit for expenses pursuant to his financial disclosure*

The petitioner was not at fault for providing 2006 year to date income, as he was required to do so, by the Family Court, for the purpose of modifying child support. The Family Court erred and the Circuit Court erred by affirming the Family Court's failure to average the father's self-employment income during the period he was self-employed in accordance with West Virginia Code 48-1-228.

West Virginia law is clear that the petitioner's self-employment income "shall be determined" by using an average over a thirty-six month period or a shorter period if the self-employment income began less than thirty-six moths ago. In the instant case, the Family Court disregarded the petitoner's self-employment income from prior periods and only used the petitoner's year to date 2006 income and instead of averaging it in accordance with the West Virginia Code 48-1-228 section (7), the Family Court increased the annual income as if the father would earn the same net monthly income the remaining months of the year. The Family Court not complying with the law results in a higher child support obligation to the father. The legislature's intent is clear and the language in the law "shall" makes it mandatory. See *Evans v. Evans No. 33045*

In response to the petitioner's *Ground 5* appeal from Family Court order to the Circuit Court, the Family Court erred when it found that Rule 55 of the West Virginia Supreme Court of Appeals Rules of Practice and Procedure for Family Courts had been rescinded prior to the petitioner filing for sanctions. The Family Court erred by denying the petitioner's motion for sanctions against Miss Sears. The Family Court erred by

hearing the petitioner's petition for sanctions without the matter being noticed to the parties and not properly before the Family Court for hearing.

Rule 55 was not rescinded as the Family Court found, but rather the language in Rule 55 was moved completely without changes, deletions or additions and incorporated in Rule 6 on December 1, 2005. At the same time, new language on another subject matter was added as Rule 55. The Family Court found that Rule 55 language had been rescinded prior to the petitioner's filing. The date of the filing is not critical, but rather the date of the offense; Miss Sears requested the petitioner's and spouse's jointly filed confidential state income tax records on June 20, 2005. On that date, Rule 55 of the West Virginia Supreme Court of Appeals Rules of Practice and Procedure Family Court prohibited that request. At the time of the filing for sanctions and currently Rule 6 prohibited Miss Sears'actions. However, the petition's filing alleged a violation of Rule 55 because that is the rule that was in effect at the time of the offense. At the underlying hearing the respondent's attorney informed the Family Court that Rule 55 had been rescinded. When in actuality, the language of Rule 55 was not rescinded, but rather moved and incorporated into Rule 6 on December 1, 2005.

The Circuit Court's affirmation of the Family Court's order should be overturned as the matter was not properly noticed to the parties for consideration and the Family Court erred by finding Rule 55 had been rescinded and therefore, did not consider sanctions against the respondent's attorney for violation of the West Virginia Supreme Court of Appeals Rules of Practice and Procedure for Family Court.

ASSIGNMENT OF ERRORS

A. The Circuit Court erred when it ruled that the Family Court was without jurisdiction to modify child support during the pendency of an appeal petition and then after the resolution of the appeal was permitted to do more than only dismiss the matter and found jurisdiction is automatically restored once the appeal is decided.

B. The Circuit Court erred when it affirmed the Family Court's not averaging the petitioner's self-employment income when modifying child support in accordance with the applicable law.

C. The Circuit Court erred when it found that the matter of attorney sanctions had been considered on it merits by the Family Court and that despite the change in West Virginia Supreme Court's Rules of Practice and Procedure for Family Court, the Family Court had considered the correct rule.

POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

Standard of Review

Under West Virginia Code 51-2A-14©, "the circuit court shall review the

findings of fact made by the family court under the clearly erroneous standard and shall review the application of law to the facts under an abuse of discretion standard." The West Virginia Supreme Court of Appeals has further held the following in regard to the applicable standard of review in such matters:

> In reviewing a final order entered by a circuit judge upon a review of, or refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo.

Staton v. Staton, 218 W. Va. 201; 624 S.E.2d 548 (2005); Syl. Carr v. Hancock, 216 W. Va. 474, 607 S.E.2d 803 (2004). See also Syl. pt.2, Lucas V. Lucas 215 W. Va. 1, 592 W.Va. 1, 592 S.E.2d 646 (2003)("In reviewing challenges to findings made by a family court judge that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to de nova review.")

A. THE ROANE COUNTY CIRCUIT COURT ERRED WHEN IT FOUND THAT THE FAMILY COURT'S JURISDICTION WAS AUTOMATICALLY RESTORED UPON APPEAL PETITION RESOLUTION BY THE WEST VIRGINIA SUPREME COURT OF APPEALS

The Supreme Court should reverse the Circuit Court's Final Order entered March 13, 2008, wherein it erroneously found that once the Family Court did not have jurisdiction to entertain the subject matter before it, then the jurisdiction was automatically restored (without further pleadings) upon appeal resolution. The Circuit Court's order is inconsistent with a long line of cases regarding jurisdiction beginning with:

> Hinkle v. Bauer Lumber & Home Bldg. Center, Inc., 158 W. Va. 492, 211 S.E.2d 705 (1975) ("Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.").

The Circuit Court's order was erroneous as it failed to apply the portion of the *Hinkle* precedent case as follows: *"the forum court must take no further action in the case other than to dismiss it from the docket"*. The Circuit Court, to justify its deviation from precedent, draws a distinction between the *Hinkle* civil case and matters in Family Court. However, in Ray v. Ray No. 31674 (Per Curiam)(Albright, J., concurring)(June 23, 2004), the Supreme Court drew no such distinction and went to great lengths to insure the application of the jurisdiction precedents in Family Court matters. In *Ray v. Ray*, the petition originated in Family Court and pertained to the modification of child support. The Supreme Court addressed subject matter jurisdiction in Family Court, even though neither party briefed the matter of jurisdiction.

Ray v. Ray No. 31674 (Per Curiam)(Albright, J., concurring)(June 23, 2004)

> The initial issue we must address, which was not briefed by the parties, involves the subject matter jurisdiction of the family court to entertain the petition to modify child support filed in this case. We have held that "[w]here neither party to an appeal raises, briefs, or argues a jurisdictional

question presented, this Court has the inherent power and duty to determine [the issue] unilaterally[.]" Syl. pt. 2, in part, James M.B. v. Carolyn M., 193 W. Va. 289, 456 S.E.2d 16 (1995). Insofar as subject matter jurisdiction is not waivable, we may sua sponte address the matter. See Snider v. Snider, 209 W. Va. 771, 777, 551 S.E.2d 693, 699 (2001) ("Whether a court has subject matter jurisdiction over an issue is a question of law which may be raised at any point in the proceedings.").

Mr. Ray filed a "Petition for Modification" of the child support order with the family court on January 3, 2002. (See footnote 7) In that petition, Mr. Ray expressly alleged that he was filing the petition pursuant to W. Va. Code § 48-11-105 (2001) (Repl. Vol. 2001). (See footnote 8) Further, Mr. Ray's petition alleged that he was seeking to modify the December 4, 2001, child support order. The jurisdictional issue presented by the above facts is whether the December 4, 2001, child support order had to be initially challenged by an appeal, or the appeal period had to have expired, before a petition to modify under W. Va. Code § 48-11-105 could be entertained by the family court. (See footnote 9) As we shall explain below, the family court did not have jurisdiction to entertain a petition for modification of the child support order under W. Va. Code § 48-11-105 while that order was appealable.

At the time Mr. Ray filed his petition for modification, the Legislature had enacted W. Va. Code § 51-2A-10 (a) (2001), which became effective January 1, 2002, and provides the exclusive procedure for challenging a final order of the family court prior to filing an appeal. (See footnote 10) This statute provides as follows:

> Any party may file a motion for reconsideration of a temporary or final order of the family court for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been available at the time the matter was submitted to the court for decision; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) clerical or other technical deficiencies contained in the order; or (5) any other reason justifying relief from the operation of the order.

W. Va. Code § 51-2A-10(a). See also Rule 25, West Virginia Rules of Practice and Procedure for Family Court ("Any party may file a motion for reconsideration of a family court order as provided in W. Va. Code, § 51-2A-10.").

Mr. Ray did not avail himself of the relief permitted by W. Va. Code § 51-2A- 10(a). Instead, Mr. Ray erroneously invoked W. Va. Code § 48-11-105. (See footnote 11) Absent a petition for appeal to this Court and an adverse ruling or the expiration of the appeal period, (See footnote

12) Mr. Ray could not challenge the child support order pursuant to W. Va. Code § 48-11-105. (See footnote 13) He had to invoke W. Va. Code § 51-2A-10(a). (See footnote 14) Consequently, the family court judge did not have jurisdiction over the petition for modification filed on January 3, 2002, pursuant to W. Va. Code § 48-11-105. (See footnote 15) See Syl. pt. 1, Hinkle v. Bauer Lumber & Home Bldg. Center, Inc., 158 W. Va. 492, 211 S.E.2d 705 (1975) ("Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket."). (See footnote 16)

In view of the above analysis, the family court's order modifying child support must be reversed. (See footnote 17)

In the instant matter, the respondent's Petition to Modify Child Support was filed on **February 28, 2006**. Previously, on **February 6, 2006**, the respondent had filed a Petition for Appeal with the West Virginia Supreme Court of Appeals. The petition appealed the Roane County Circuit Court's order that overturned the Family Court's order granting Rule 60(b) relief modifying the child support order entered November 6, 2002 and requiring the retroactive recalculation of prior year's child support. In essence, the respondent was Petitioning the Supreme Court to overturn the Circuit Court's order and modify the child support order entered November 6, 2002 and twenty-two days later, while the petition was still pending before the Supreme Court, the respondent filed a Petition of Modification of Support with the Family Court seeking to modify the November 6, 2002 child support order as well. Clearly, the matter was before the Supreme Court and the Family Court lacked jurisdiction to do anything other than to dismiss the matter from its docket.

The West Virginia Supreme Court of Appeals denied the respondent's appeal petition by order entered July 7, 2006. However, to further illustrate the Family Court's lack of jurisdiction, consider the outcome if the Supreme Court

had granted the Appeal Petition and granted the respondent's requested relief. If so, the November 6, 2002 Child Support order would have been modified by the Supreme Court's decision and the Modification Petition before the Family Court would have been moot. Clearly, this is why the Supreme Court is the Court of Jurisdiction pending the appeal period or when a Petition for Appeal is pending.

B. THE ROANE COUNTY CIRCUIT COURT ERRED WHEN IT FAILED TO CONSIDER THE PETITONER'S APPEAL OF THE FAMILY COURT'S CHILD SUPPORT CALCULATION AS THE FAMILY COURT FAILED TO FOLLOW APPLICABLE LAW

The Supreme Court should reverse the Circuit Court's Final Order entered March 13, 2008, wherein it erroneously failed to consider[5] the petitioner's appeal regarding the averaging of self-employment income when calculating child support. The Family Court erred by not averaging the petitioner's self-employment income, but instead based the child support obligation on the petitioner's self-employment income for the current year (year to date 2006) earnings only.

> West Virginia Code 48-1-228 section (7):
> *Income from self-employment or the operation of a business, minus ordinary and necessary expenses which are not reimbursable, and which are lawfully deductible in computing taxable income under applicable income tax laws, and minus FICA and medicare contributions made in excess of the amount that would be paid on an equal amount of income if the parent was not self-employed: Provided, That the amount of monthly income to be included in gross income* **shall** be (emphasis added)

[5] In one portion of the Circuit Court's Order it states "the court will not entertain an issue raised for the first time on appeal" and in another it states with respect to this error assignment, the Family Court's order is affirmed.

determined by averaging the income from such employment during the previous thirty-six-month period or during a period beginning with the month in which the parent first received such income, whichever period is shorter;

West Virginia law is clear that the father's self-employment income "**shall be determined**" by using an average over a thirty-six month period or a shorter period if the self-employment income began less than thirty-six moths ago. In the instant case, the Family Court disregarded the petitioner's self-employment income prior to the year 2006 and only used the petitioner's year to date 2006 income and instead of averaging the income in accordance with the West Virginia Code 48-1-228 section (7), the Family Court increased the annual income as if the petitioner would earn the same net monthly income the remaining months of the 2006 year. The Family Court not complying with the law results in a higher child support obligation for the petitioner. The legislature's intent is clear and the language **"shall"** makes it mandatory.

From the Supreme Court of Appeals Case Evans v. Evans No. 33045,

> "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syllabus Point 1, Nelson v. West Virginia Public Employees Insurance Board, 171 W.Va. 445, 300 S.E.2d 86 (1982).

The petitioner further offers that the Family Court record reflects he did object to the Family Court's method of calculating child support and referred the Family Court to West Virginia law regarding the requirement to average self-employment income for purpose of calculating child support

The Circuit Court erred when it failed to consider the Family Court's erroneous application of West Virginia Code 48-1-228 section (7), by not averaging the petitioner's income when calculating child support, therefore, the order should be overturned and child support calculated using the average of the petitioner's income in accordance with W.Va. 48-1-228 section (7).

C. THE ROANE COUNTY CIRCUIT COURT ERRED WHEN IT FOUND THE FAMILY COURT HAD CONSIDERED THE MERITS OF THE FILING FOR SANCTIONS AGAINST ATTORNEY H. BETH SEARS FOR VIOLATION OF RULES OF PRACTICE AND PROCEDURE

The Circuit Court erred when it affirmed the Family Court's denial of sanctions against Attorney H. Beth Sears. The Family Court erred when it based it entire order on this matter on Rule 55 of the West Virginia Supreme Court of Appeals Rules of Practice and Procedure for Family Courts being rescinded prior to the petitioner filing for sanctions. The Family Court erred by denying the petitioner's motion for sanctions against Miss Sears. The Family Court erred by hearing the petitioner's petition for sanctions without the matter being noticed to the parties and not properly before the Court for hearing.

Rule 55 was not rescinded as the Family Court found, but rather the language in Rule 55 was moved completely without changes, deletions or additions and incorporated in Rule 6 on **December 1, 2005**. At the same time new language on another subject

matter was added as Rule 55. The Family Court found that the language had been rescinded prior to the petitioner's filing for sanctions. The date of the filing is not critical, but rather the date of the offense. On June 20, 2005, Miss Sears requested the petitioner's and current spouse's jointly filed confidential state income tax records. On that date, Rule 55 of the West Virginia Supreme Court of Appeals Rules of Practice and Procedure for Family Courts prohibited that request. At the time of the filing for sanctions and currently Rule 6 prohibited Miss Sears' action. However, the petitioner's petition alleged a violation of Rule 55 because that is the rule that was in effect at the time of the offense. At the underlying hearing the respondent's attorney informed the Family Court that Rule 55 had been rescinded. When in actuality, the language of Rule 55 was not rescinded, but rather moved and incorporated into Rule 6 on December 1, 2005. The Family Court did not verify or investigate further Miss Sears' representation prior to issuing the ruling.

In its order, prepared by H. Beth Sears, the Family Court found the State Tax Department was at fault for releasing the records in response to Miss. Sears' subpoena, and later (the Tax Department) requested that the same be returned to them as being issued in error. However, the Family Court in its failure to fully consider the matter on its merits, overlooked significant and troubling inconsistencies regarding application of the Supreme Court's rule. The following were not considered on their merits.

1. What were the requirements of Rule 55 at the time the records were requested?
2. The Family Court faults the State Tax Department; however, the tax

department's actions were in violation of West Virginia Code 11-10-5, not the Supreme Court's Rules of Practice and Procedure for Family Courts, which Miss Sears is to be held accountable.

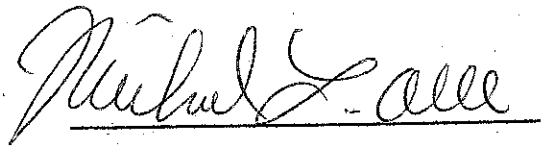
3. The Family Court's order finds that Miss Sears returned the records when notified by the State Tax Department, however, the Family Court did not consider the merits of the State Tax Department initially informing Miss Sears it was prohibited by law from compiling with her subpoena duces tecum and then surprising a few days later providing her the records.
4. The Family Court did not consider the merits of Miss Sears having the records in her possession on or about July 12, 2005 and not entering them into record until February 2, 2006. Shortly thereafter, the petitioner contacted Miss Sears and informed her of the violation of West Virginia law and Supreme Court Rules. He as well contacted the State Tax Department and only then did the State Tax Department begin an investigation that led to a request for return of the records.

The Family Court erred by basing its ruling on Rule 55 being rescinded at the time of the filing and not considering the merits of the facts of the matter as it applies to the law.

CONCLUSION AND PRAY FOR RELIEF

For all the foregoing reasons, the petitioner respectfully requests that the Supreme

Court grants his Petition for Appeal and reverses the Circuit Court of Roane County's erroneous order regarding Family Court subject matter jurisdiction, self-employment income averaging and attorney sanctions for confidentiality rule violations.



Michael L. Allen, pro se, petitioner

122 Dodd Drive
Spencer, WV 25276
304 927-5606

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SHELIA D. ALLEN,
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Plaintiff,

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CIVIL ACTION No. 97-D-24

MICHAEL L. ALLEN,
Defendant.

West Virginia Supreme Court of Appeals

Certificate of Service

The undersigned, pro se petitioner, hereby certifies that on the 18th day of June, 2008, he served the PETITION TO APPEAL CIRCUIT COURT ORDER ENTERED MARCH 13, 2008, DOCKETING STATEMENT AND DESIGNATION OF THE RECORD on the party to the petition regarding sanctions at her last known business address of record

H. Beth Sears
Hancock & Sears
P.O. Box 305
Ravenswood, W 26164
304 273-5331

Michael L. Allen
Pro se petitioner
122 Dodd Drive
Spencer, WV 25276
304 927-5606